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255701—53——1

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 726

LEONARD S. GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 97–101)[1] is reported at 202 F. 2d 596.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1953 (R. 102), and the petition for rehearing was denied March 18, 1953 (R. 103). The petition for a writ of certiorari

[1] The record in this Court consists of six typewritten volumes. The pagination of Volume I runs from 1 to 104. The pagination of Volume II through Volume VI runs from 1 to 1759. References to Volume I will be designated "R." References to the other volumes will be designated "Tr."

was filed April 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the trial court erred in admitting "summaries" of the evidence as to petitioner's records and returns.

3. Whether the trial court erred in admitting the amended returns for 1945 and 1946.

4. Whether the trial court properly and fully instructed the jury.

5. Whether the counts involving the wife's returns charged offenses identical with the counts involving petitioner's returns.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the

payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. [1946 ed.] 145.)

STATEMENT

On March 14, 1951, a four-count indictment was filed against petitioner in the United States District Court for the Southern District of California. Count One (R. 2–3) charged that on or about April 15, 1946, petitioner filed a false income tax return, wherein he stated that his net income for the year 1945 was $29,575.63 and that the tax due was $12,765.27 although he knew that his net income was $39,507.62 and that the tax due was $19,374.52, thus wilfully attempting to evade a large part of the tax in violation of Section 145 (b) of the Internal Revenue Code. Count Two (R. 3) charged petitioner with a similar attempt to evade his wife's income taxes for 1945 in an equal amount, computed on the community property basis. Count Three (R. 4) charged petitioner with attempting to evade his income taxes for 1946 by filing a false return in which he stated that his net income was $7,920.71 on which a tax of $1,411.90 was due, whereas he knew that his net income was $19,719.31 and that the tax due was $6,000.42. Count Four (R. 4–5)

charged petitioner with a similar attempt to evade his wife's income taxes for 1946. After a jury trial petitioner was convicted on all four counts. (R. 57–59.) On October 22, 1951, he was sentenced to consecutive terms of imprisonment for three years on Counts One and Three and fined $10,000 on each. Execution of the prison terms was suspended, however, and he was placed on probation for five years. Similar terms of imprisonment were imposed on Counts Two and Four, to run concurrently with the terms on Counts One and Three, respectively, and execution was likewise suspended as to these. (R. 85–88.) The Court of Appeals affirmed (R. 97–102.)

The evidence to support the verdict may briefly be summarized as follows:

During 1945 and 1946 petitioner was the sole proprietor of Grocers Packing Company[2] (Tr. 129, 135, 194, 1441), through which he bought dried beans and other dried foods in the bulk, placed them in small family-size packages, and then resold them to grocers (Tr. 631–633, 1438–1443). From a very small beginning in 1932 (Tr. 1438–1440) the business grew until its gross yearly income amounted to about $5,000,000 during the period involved here (Tr. 461–462, 726, 1448–1449). Part of this income was derived from salvage, by reselling the bags in which the bulk beans were received, and by selling spoiled or "cull" beans to farmers as hog feed. The

[2] The business was incorporated early in 1947 (Tr. 1590).

Government's proof showed that the business received $19,863.97 from such sources during 1945, and $23,597.20 during 1946. (Tr. 28–32, 33–39, 40–42, 50–53, 61–64, 89–93, 526–527, 532–534, 549–551.)

William F. DeMaris testified that he was office manager for the company from 1943 to January 1945; that he set up a new system of accounts shortly after taking over, and in so doing discovered that the income from the sacks and "cull" beans was not being entered on the books; that he was informed by petitioner that he had always appropriated this income himself in lieu of a salary and it was not to be set up on the books; and that he thereafter kept no records of this income. (Tr. 122–138, 151–152, 172–173.) Edward J. Beaumont testified that he succeeded DeMaris as officer manager and that he also knew about the unrecorded income, but that he was told by petitioner that it was being reported on his personal income tax returns and that he did not want it handled in the regular accounts. (Tr. 184–195.) Theodore Rose testified that he had charge of the books during 1945 and part of 1946 and that he knew of no income from sacks and "cull" beans, although the records of such transactions should normally have come across his desk. (Tr. 204, 212–213.)

Pearl Diamond testified that she was in charge of accounts payable from 1944 to 1947 but that she also handled certain accounts receivable, *i. e.*,

the income from the sacks and "cull" beans; that when such a sale was made, she made out an invoice in triplicate, gave two copies to the purchaser and kept the other in her desk; that when she received the check from the office manager or from petitioner's secretary she attached the invoice to it and gave it to petitioner; and that she made no record of these transactions in the books and never saw the invoice after she had given it to petitioner. (Tr. 265, 267–269, 272–273, 277.) Margaret Hundsdoefer, petitioner's secretary from 1944 to 1948, testified that she opened all mail delivered to the main plant and routed it to the department concerned; that all checks were routed to the accounts receivable department, with the exception of checks in payment for sacks and "cull" beans which were routed to Miss Diamond; and that she made no record of incoming checks. (Tr. 228, 230–232, 248.) Daniel Blacher, credit manager from 1944 through 1946, testified that it was his duty to see that all accounts receivable were collected, to enter the amounts in the cash receipts book, and to deposit the funds in the bank in the account of the Grocers Packing Company; that there were no accounts receivable on the books for customers who bought sacks and "cull" beans, and that checks from these customers did not come to him normally; that if such checks did come to him he turned them over to petitioner or his secretary without entering them in the cash receipts book; that some of these

checks were occasionally given back to him by petitioner to be cashed for petitioner or deposited in petitioner's personal bank account, but that he kept no record of them; and that these were the only checks which were not recorded in the cash receipts book. (Tr. 353–363, 371.)

Phillip Anderson, a certified public accountant, testified that he handled the Grocers Packing Company account from October 1945 until May 1947; that he regularly audited the books in preparing monthly and year-end accounts; that he had no knowledge of any income from sacks or "cull" beans; that he prepared the income tax returns for petitioner and his wife for 1945 and 1946 from the books of the company and from information obtained from petitioner; and that in answer to his questions as to "Other items of income" petitioner told him that it would all be found on the books of the company.[3] (Tr. 296–311.)

Internal Revenue Agent Calkins testified that, in investigating petitioner's returns for 1945 and 1946, he found that the returns properly reflected the income recorded on the books, but he was unable to discover in the books any trace of income from the sale of sacks (Tr. 506–510); that peti-

[3] Newman, the certified public accountant who had audited the books before Anderson, prepared petitioner's income tax returns for 1943 and 1944 and included income from the sale of sacks and hog feed. This item was not on the books, however, and he had picked it up "outside." (Tr. 1258–1262.)

tioner then told him that these sales were run through the regular sales account books and all the sacks had been sold to U. S. Bag & Supply Company (Tr. 510–511); that he obtained the cancelled checks from U. S. Bag & Supply Company but still could not locate these sales in the books of Grocers Packing Company (Tr. 511–512); that petitioner then changed his story and said that this money was not recorded in the books but went directly to him as salary (Tr. 512, 604–606); and that he analyzed petitioner's personal bank account and discovered that the proceeds from sack and "cull" bean sales had been deposited there, but never recorded as income on the books of the company, and never reported as income in the returns of petitioner and his wife (Tr. 515–521, 530–557). Petitioner admitted to the agent under oath that he knew the manner in which these sales were being handled, and said that he destroyed the invoices periodically in cleaning out his desk. (Tr. 525–527.)

On June 10, 1949, over a year after the Bureau of Internal Revenue had begun to examine the criminal aspect of the case (Tr. 430–434, 819–820, 992), petitioner and his wife filed amended returns for 1945 and 1946 in which they included the full amounts of income from the sacks and "cull" beans as developed by Agent Calkins' investigation (Tr. 30, 502, 987–989). Petitioner did this at the insistence of his attorney and his accountant who advised him that he could not pre-

vail in a civil suit to recover these deficiency assessments because he would be unable to sustain the burden of proof. (Tr. 818–827, 987–993, 1551–1554, 1659–1663.) The amended returns were forwarded with the following letter (Def. Ex. AF, Tr. 821–824):

> COLLECTOR OF INTERNAL REVENUE,
> *312 North Spring St.,*
> *Los Angeles 12, California.*
>
> DEAR SIR: My attorney, Emmett E. Doherty, Esq., of Los Angeles, California, advised me that an audit of my business and personal records gave rise to a question whether or not I paid all income taxes due for the years 1944, 1945 and 1946.
>
> Please be advised that all my income tax returns were prepared by long established certified public accountant firms, who were well recommended to me by banks and other sources of high repute. Likewise, those firms audited the books of my business organization.
>
> During those periods, I lived modestly, withdrawing from my business only such sums as were necessary for the support of my family. With those exceptions, all other sums remained in the business for working capital.
>
> I believe all taxes due the United States were paid. However, my present auditors advised me that former accounting firms committed many errors, which, they, the present auditors have corrected. I have

been informed and believe that the books are now in good order.

It appears that the records, being unintelligible in some respects, did not reflect a complete business picture. We find errors for myself and my wife as follows—

Years:	Tax
1944	$2,622.08
1945	13,082.50
1946	9,164.54
	24,869.12

Enclosed herewith please find a check in the above amount to be credited to my wife's and my income taxes accounts for the above named years, in amounts as stated. Enclosed also please find amended income tax returns for the same periods for myself and wife, Frances M. Gordon.

Very truly yours,

S LEONARD GORDON,
Leonard Gordon.

LG: nl
enc.

ARGUMENT

1. Petitioner contends (Pet. 3–4, 5, 9–11) that the evidence for the prosecution is circumstantial, that it is as consistent with innocence as it is with guilt, and that it is insufficient to support the verdict. The argument is without merit.

The evidence that the income from sacks and "cull" beans was unrecorded in the books and unreported in petitioner's returns was direct. DeMaris, who set up the books, testified that he was instructed by petitioner to omit this income.

The witnesses who were in charge of the books, DeMaris, Beaumont, Rose and Blacher, testified that it was not recorded. The witnesses who handled the income, Diamond, Hundsdoefer and Blacher, testified that they made no record of it. The witness who made out petitioner's returns, Anderson, testified that he relied on the books and knew nothing of sacks and "cull" beans. Agent Calkins obtained the cancelled checks and testified definitely that they were not recorded as income on the books (Tr. 532, 547, 579, 590, 596), and petitioner himself admitted to Calkins that the income was not recorded. (Tr. 512, 604–606.)

The evidence of wilfulness was circumstantial. Petitioner is a highly successful business man with considerable knowledge of accounting. (Tr. 238–241, 1444–1445, 1488, 1499–1500, 1562.) He was responsible for the unusual manner in which the sack and "cull" bean income was handled and for its omission from the regular books. Although the accountant who prepared his returns in 1943 and 1944 picked up this income from some source outside the books and reported it, petitioner changed accountants in 1945 and told the new one, Anderson, that "Other items of income" would be found on the books of the company. He destroyed the invoices, the sole records of this income. He could hardly have been unaware of such a gross deficiency in his returns—$19,863.97 in income and 34% of the

tax due in 1945, $23,597.20 in income and 76% of the tax due in 1946. (Tr. 534, 551, 557.) He was evasive with the agents during the investigation. And finally his own testimony during the trial was flatly contradicted by several prosecution witnesses. Clearly a reasonable mind might fairly have concluded that there was no reasonable doubt as to petitioner's guilt. *Curley* v. *United States,* 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari denied, 331 U. S. 837; *Gendelman* v. *United States,* 191 F. 2d 993, 995 (C. A. 9), certiorari denied, 342 U. S. 909.

From the foregoing it is quite obvious that the record does not support petitioner's contention (Pet. 3–4, 8, 9–11) that the "sole evidentiary basis" for the conclusion that income was omitted from the returns was the expert testimony of the agents, Calkins and Marshall. Moreover, the testimony of Calkins was sufficient proof in itself, for he testified that he could not trace the sack and "cull" bean income deposited in petitioner's personal account into the company's cash receipts book, into any special account receivable, or into any of the miscellaneous accounts.[4] (Tr. 511–521, 568–570, 577–596.) The contention that the books of the company were in "chaos" is contra-

[4] In 1944 Newman, the accountant making out petitioner's income tax returns, picked up over $9,000 in income of this sort from some place outside the record. As a result the returns for that year did not balance with the books, contrary to what Agent Calkins discovered for 1945 and 1946. (Tr. 598–599.)

dicted by the accountants, Anderson (Tr. 312–314, 348–349) and Newman (Tr. 1263–1264, 1267), who testified that they were generally adequate although they failed to take into account the particular income involved here.

2. Petitioner contends (Pet. 4, 8, 11–12) that the trial court erred in admitting in evidence "summaries" prepared by Agent Calkins to illustrate his testimony. When these "summaries" were distributed to the jury the trial judge explained that they were based upon the evidence already before the court, and that they were not controlling in themselves but were prepared merely to enable the jury to follow Calkins' explanation of the voluminous evidence. (Tr. 464–465, 502–504.) They were based upon the checks and invoice copies obtained from the purchasers (Tr. 34–38, 200AA), petitioner's tax returns and bank records (Tr. 28–32, 179–182), and Calkins' own testimony as to his examination of the company books (Tr. 530–558). They were, therefore, based entirely upon evidence in the record. Whether the agent also had "work-papers," transcribed from the company books, was, therefore, immaterial. Actually, most of the "work-papers" were made available to defense counsel (Tr. 560–568) and he could have had the remainder had he so desired (Tr. 623–624). Furthermore, the original books themselves were produced by defense counsel in cross-examining Calkins. (Tr. 570–571.) The use of such "sum-

maries" is well recognized. *United States* v. *Johnson,* 319 U. S. 503, 519; *Gendelman* v. *United States, supra.*

3. Petitioner contends (Pet. 4, 8, 12–15) that the amended returns, being offers to compromise his civil tax liability, were erroneously allowed in evidence as admissions against interest. He contends that he did not intend to admit anything by filing them.

As has been pointed out (*supra,* pp. 8–10), these amended returns were filed long after petitioner was aware that criminal proceedings were being contemplated; they accepted the deficiency figures as determined by Agent Calkins' investigation; and they were forwarded with a letter which said, "We find errors for myself and my wife," and which contained a check for the stated amount. At the trial petitioner's counsel argued strenuously that the court should take evidence, out of the presence of the jury, to determine whether the amended returns were admissible as admissions against interest. The court, however, ruled that they were *some* evidence of an admission, and that the weight to be given them was a matter for the jury to determine in the light of all the circumstances. (Tr. 471–501.) Thereafter, petitioner, his accountant, and his attorney, all testified that he had not intended to admit anything by filing the amended returns but was simply seeking to settle the civil controversy.

(Tr. 485–487, 813–828, 833–835, 987–993, 1551–1561, 1659–1663.)

The trial court was clearly correct. The issue raised by petitioner's objection was the relevance of the amended returns, *i. e.*, whether they tended to prove that reportable income had been omitted from the original returns. They had such a tendency if they constituted admissions of error in the original returns; they had no such tendency if they were merely intended to settle a civil controversy in which petitioner conceded nothing but realized he could not prevail. Whether an offer to pay a claim is an admission against interest, and therefore relevant to an issue before the court, depends upon the circumstances under which it was made. IV Wigmore, *Evidence* (3d ed., 1940), Secs. 1048 (1) (b), 1061. Had this been clearly an offer to compromise a disputed civil liability, or had it been clearly done solely to dispose of the civil case, and had it been clear that no admission of fact was intended, the returns would have been inadmissible. But it was apparent that the amended returns had been filed while a criminal prosecution was in the offing, that they accepted the Government's figures without question, and that the accompanying letter admitted errors. They were certainly *some* evidence, at least, of an admission by petitioner that he had omitted income which should have been reported in his original returns. Whether

he actually intended such an admission was a question for the jury in the light of all the evidence. *United States* v. *Rosenblum,* 176 F. 2d 321, 330 (C. A. 7), certiorari denied, 338 U. S. 893; *Heindel* v. *United States,* 150 F. 2d 493 (C. A. 6); *Cooper* v. *Brown,* 126 F. 2d 874, 878–879 (C. A. 3); *Emmich* v. *United States,* 298 Fed. 5, 9–10 (C. A. 6), certiorari denied, 266 U. S. 608.

The charge to the jury has not been included in the record before this Court. It must be assumed, therefore, that the trial court properly left it to the jury to determine what weight, if any, was to be given to the amended returns. Petitioner sets forth in a footnote (Pet. 14) an "instruction" which he asserts was read to the jury. Actually, this was read to counsel in chambers while proposed charges were being discussed, and was not accepted by the trial judge because it did not adequately state petitioner's position. Petitioner's counsel asked leave to consider the trial judge's proposed revision overnight. (Tr. 1285, 1311–1314.) The record does not show what the jury were eventually told.

4. Petitioner contends (Pet. 4, 15–16) that the trial court erred in refusing certain specific requested instructions. The record in this Court contains those instructions requested by petitioner and not given. Some were simply refused; others

were refused as being already covered in other instructions. (R. 32–56.) The record also contains the discussion of the proposed charge in chambers, to which reference was made in the previous point. At the conclusion of this conference there were still several points to be clarified. (Tr. 1285–1323, see particularly 1301, 1306–1307, 1310–1314, 1320, 1322.) The record does not contain the charge which was finally given.

Petitioner confines his argument on this point to a recitation of the various proposed instructions which the trial court allegedly refused to give. Obviously this Court cannot review the charge in the absence of a proper record.

5. Finally, it is contended (Pet. 4, 17–18) that Counts Two and Four, the counts involving the wife's returns, should have been dismissed on grounds of double jeopardy. Since the sentences on these counts are concurrent with the sentences on Counts One and Three on which petitioner was properly convicted, there is no need to consider this alleged error. *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105; cf. *Pinkerton* v. *United States,* 328 U. S. 640, 641–642.

CONCLUSION

The decision below is clearly correct, and presents no question calling for review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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